89-846

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1989 Term

GUILLERMO SUAREZ, Petitioner,
vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Counsel for Petitioner

The Petitioner, Guillermo Suarez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 24, 1989.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Middle District of Florida committed reversible error by violating the express terms of Rule 30 of the Federal Rules of Criminal Procedure, and whether the decision of the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a course by the Federal District Court, as to call for an exercise of this Court's power of supervision, by failing to reverse the Federal District Court's violation of Rule 30.

2. Whether the United States District Court for the Middle District of Florida abused its discretion by failing to allow the Petitioner/Defendant, Guillermo Suarez, sufficient time to prepare his closing argument in the trial of the cause, and whether the decision of the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision, by failing to reverse the Petitioner's conviction based upon the inadequate time allowed for the preparation of the closing arguments.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Middle District of Florida. However, a copy of the judgment and sentence rendered by that Court against Petitioner/Defendant, Guillermo Suarez, is attached in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 24, 1989. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this petition is Rule 30, Federal Rules of Criminal Procedure which provides as follows:

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the Court reasonable directs any party may file written requests that the Court instruct the jury on the law as set forth in the request. At the same time, copies of such requests shall be furnished to all parties. The Court shall inform counsel of its proposed action on the request prior to their arguments to the jury. The Court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, the presence of the jury. (emphasis supplied)

STATEMENT OF THE CASE

Petitioner, Guillermo Suarez, was indicted for three counts of tax evasion on April 6, 1988. Count I of the Indictment charged Dr. Suarez with a violation of 26 USC §7201 for attempting to defeat or evade his personal taxes for the year 1981. Count II involved a similar charge for the year 1982 and Count III likewise involved a charge for tax evasion for the tax year 1983.

The jury trial commenced on July 6, 1988, before the Honorable William Castagna, three months after return of the indictment. The trial lasted until July 25, 1988, or for approximately fourteen (14) trial days. On Monday, July 25, 1988, the jury returned a verdict of not guilty as to Count I, and guilty as to Counts II and III. On October 7, 1988, the District Court sentenced Dr. Suarez as to Count II to imprisonment for a period of six (6) months. As to Count III,

he was sentenced to a term of imprisonment for a period of three (3) years, imposition of which was suspended. Dr. Suarez was placed on probation for a term of five (5) years, with the condition that he pay a fine of $50,000.00 within six (6) months and with the further condition that he contribute 500 hours of community service per year during the period of probation. Dr. Suarez timely filed a Notice of Appeal from the judgment and sentence rendered on October 7, 1988.

On August 7, 1988, oral arguments were held in the Eleventh Circuit Court of Appeals. Thereafter, on August 24, 1989, the Eleventh Circuit entered its per curiam affirmance of the judgment and sentence of the District Court. This Petition for Certiorari was timely filed thereafter.

During the trial, the Petitioner presented numerous witnesses on his behalf. After the last such witness testified, the

defense rested. The government then announced there would be no rebuttal. Counsel and the Court then discussed the scheduling of closing arguments. The discussions were taking place on Thursday, July 21, 1988, just prior to 3:00 p.m. After the Court indicated the possibility of wrapping up both the instructions and the closing arguments on that day, defense counsel requested that arguments not be held on that day, in order to fully prepare for closing as well as to fully discuss the proposed jury instructions. Defense counsel specifically requested that arguments not be held that day. Despite defense counsel's statement that he was not prepared to proceed at that time, the Court decided to adhere to its schedule.

The Court then recessed from 2:55 p.m. until 3:10 p.m. Immediately after recess, the Court presented counsel with its proposed

instructions. Some of these were standard instructions, some of these were instructions which had been requested by the defense, but none of these instructions were numbered as they had been when they were proposed by the Petitioner or the Government. At the time they were presented to defense counsel, it was impossible to determine, without first reading through them and comparing them to counsel's own proposed instructions, whether they were one of the defenses requested instructions, a standard instruction, some different type of instruction, or one of the Court's own instructions. As a result, it was impossible for defense counsel at that moment to determine whether he wanted to object to any of the given instructions or not. Defense counsel immediately voiced objection to not having had a chance to review the instructions prior to being

required by the Court to accept, or reject them.

After proceeding through the first few proposed instructions, defense counsel again objected to the manner in which the instructions were being presented, i.e., without being given an adequate opportunity to review them, prior to being made to accept or reject them. The crucial issue in this case was whether the alleged taxable income was in fact taxable income, or whether such payments were loans and or repayments of loans to the Petitioner. Therefore the instructions pertaining to the definition of loans was crucially important. Court and counsel had a discussion concerning instruction D-D, pertaining to the definition of loan, particularly concerning the intent to repay element of that instruction. The Government requested an insertion of language that if there was no intent to repay, there

was not a loan. The Court at this time, prior to closing arguments, declined to make such an insertion. The Court would later, after closing arguments, make the insertion.

After discussing other instructions, but before completion of the charge conference and before it had ruled on all of the proposed or requested instructions, the Court decided to proceed with closing arguments to "keep our schedule". The Court announced that closing arguments would start then, on Thursday afternoon, and that the Court would reconvene the next morning, Friday, the 23rd, at which time the charge conference would be "concluded".

The Government then began its closing arguments. After that the Court took a brief recess from 4:55 p.m. to 5:10 p.m. The defense then made its closing argument. The Government then made its final closing argument. The Court then adjourned for the

day, Thursday, July 21, 1988, at 7:05 p.m.

On the next morning, Friday, July 22, 1988, the Court resumed work on its proposed instructions. Court and counsel then discussed again Instruction D-D, concerning the definition of loan. The Government's counsel again requested the insertion of the following language:

> "However, merely denominating a transaction as a loan is not sufficient to make it such and where there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such."

The Court then agreed to insert such language, and did in fact charge the jury with said language when it gave the loan instruction. Defense counsel maintained his objection to the insertion.

Thereafter the Court instructed the jury, and they began their deliberations. During deliberations, the jury came back with an inquiry. The jury informed the Court that

it was unable to reach a unanimous decision. The Judge asked whether continued deliberations might enable the jury to reach a verdict, to which the foremen replied that a weekend recess might enable it to do so. In response, the Court recessed on Friday, July 22, 1988 at 5:00 p.m. to reconvene on Monday morning, July 25, 1988. After a short period of deliberation on Monday morning, the jury reached its verdict.

The basis for Federal jurisdiction in the Court of first instance was an indictment for tax evasion and violation of Title 26 of the United States Code; 18 U.S.C. 3231.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

1. The decisions below are contrary to the express provisions of Rule 30 of the Federal Rules of Criminal Procedure, which requires the Court to inform counsel of its proposed action on jury instruction requests prior to counsel's arguments to the jury.

Rule 30 of the Federal Rules of Criminal Procedure states that "the Court shall inform counsel of its proposed action on the request [for instructions] prior to their arguments to the jury" (emphasis added).

This Rule gives the Court considerable latitude about when it may instruct a jury, either before or after closing argument. But, in contrast, Rule 30 uses mandatory language concerning informing counsel of the instructions prior to closing. The intent of the Rule is clear: To permit counsel to know what the instruction will be, so that counsel may tailor his presentation accordingly. See United States vs. Smith, 789 F.2d 196, 202 (3rd Cir. 1986); United States vs. Bowman, 798 F.2d 333 (8th Cir. 1986). By interrupting the charge conference, in its haste to "keep [its] schedule", to proceed with closing arguments, and then changing the crucial definition of loan instruction after

closing, the Court deprived defense counsel of the chance to tailor his closing arguments to the instructions given, contrary to Rule 30. Had counsel known the Court was going to water down the loan definition by inserting the language about "merely denominating a transactional loan does not make it one, etc." he would have addressed more thoroughly the intent-to-repay aspect of the facts. Significantly, the Court refused to insert such language prior to closing arguments. Defense was effectively misled as to this crucial instruction, and emphasized other aspects of the facts more than the good faith intent to repay issue in closing.

Changing such a crucial instruction after closing arguments prejudiced Defendant by preventing him from addressing with sufficient emphasis the good faith intent to repay issue at closing. The required showing of prejudice is manifest in this record.

United States vs. Cardell, 550 F.2d 604 (10th Cir. 1977). In any event, the procedure followed by the Trial Court, and approved by the Circuit Court of Appeals, is contrary to the express mandatory provisions of Rule 30, which require that counsel be informed prior to closing of the Court's proposed action on the instructions requested. The Trial Court violated Rule 30 not only by changing the loan instruction after closing arguments, but also by failing to even complete the charge conference prior to requiring counsel to give their summations. Even if the loan instruction had not been changed, counsel obviously had no way of knowing what the Court was going to do on the other requested instructions, since they had not even been addressed until after closing.

Petitioner should be granted a Writ of Certiorari because the Supreme Court has the primary responsibility for the proper

functioning of the Federal judiciary. The frequent grant of certiorari in cases involving Federal jurisdiction, practice, and procedure reflects that responsibility. Rule 19 of the Supreme Court Rules also recognizes the appropriateness of the grant of certiorari in the type of case where the Federal Appellate decision has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision. The instant case is just such a case, where the Trial Court has departed from the express requirements of Rule 30, and the Appellate Court has apparently sanctioned such a departure. Among the cases falling within the category deserving of certiorari review are those involving the administration of criminal justice in the Federal courts. See McNabb vs. United States, 318 U.S. 332,

341; Marshall vs. United States, 360 U.S. 310. Similarly, cases involving the construction of the Federal Rules of Civil or Criminal Procedure, such as this case, are deserving of certiorari review. See Hickman vs. Taylor, 329 U.S. 495; Upshaw vs. United States, 335 U.S. 410; Schlagenhauf vs. Holder, 379 U.S. 104, 109.

The bizarre practice followed by the U.S. District Court in this case has gone uncorrected by the Circuit Court of Appeals. These circumstances implicate the express requirements of the Federal Rules of Criminal Procedure, and therefore implicate appropriate Federal practice and procedure. The departure from the appropriate Federal practice and procedure, as described in Rule 30 of the Federal Rules of Criminal Procedure, should not be condoned. Therefore this Court should grant Petitioner's Writ of

Certiorari in order to restore meaning to Rule 30.

2. The decisions below, insofar as they permit the Court to give a mere fifteen minutes notice for preparation of closing arguments and review of jury instructions in an approximately three week criminal jury trial, so far departed from the accepted and usual course of judicial proceedings, that they require an exercise of this Court's power of supervision.

Perhaps the most egregious and prejudicial aspect of the Court's departure from the accepted and usual course of judicialproceedings, was springing the jury instructions on counsel and proceeding directly to closing arguments with only fifteen minutes recess for preparation. This activity occurred on Thursday afternoon, July 21, 1988, the exact chronology being detailed in the Statement of the Case, supra. The

Court could and should have simply conducted the charge conference on Thursday afternoon, in full and prior to closing, allowed counsel to prepare overnight for closing arguments to commence on Friday morning, July 22, 1988, and let the jury begin deliberations on Friday late morning or early afternoon. In any event, it would likely have been necessary for the jury to have returned on Monday, July 25, 1988 as it did anyway. There was simply no rhyme or reason to have proceeded as hastily as it did, which procedure deprived counsel of an opportunity to consider properly the jury instructions, prepare for closing arguments, or to know which instructions would be given at the time of making his closing argument. The defense counsel was prejudiced in two ways: not being apprised of the jury instructions prior to closing, and not being given adequate time to prepare in light of even those

instructions which were known prior to closing. Even if the Court's proposed rulings on the requested instructions had been covered prior to closing arguments as required by Rule 30, counsel was still given grossly inadequate time to prepare for closing arguments.

The unconscionable procedures forced upon defense counsel in this case are reminiscent of another infamous example of a court in the Middle District of Florida, Tampa Division, being excessively concerned with the time pressures of its case load to the prejudice of a defendant's constitutional right, United States vs. McClain, 823 F.2d 1457 (11th Cir. 1987). In McClain, the Eleventh Circuit held that the Defendant had been denied a fair trial due in large part to the Trial Court's emphasis on an accelerated trial schedule resulting from concern over the heavy case load existing then (and now)

in the Middle District of Florida, Tampa Division. The facts in McClain, which the Eleventh Circuit described as "a classic example of judicial error and prosecutorial misconduct combining to deprive the Defendant of a fair trial", McClain at 1459, are analagous to those in the instant case. The Eleventh Circuit saw fit to reverse Mr. McClain's conviction; it should have done the same in this case. Because it did not, certiorari should be granted to do so.

The unorthodox procedure required by the Trial Court and approved by the Court of Appeals also implicates the Petitioner's Sixth Amendment right to counsel, described in this Court's recent decision, Perry vs.Leeke, 57 U.S.L.W. 4075, (January 10, 1989). The Perry case discussed Gedders vs. United States, 425 U.S. 80 (1976), where this Court held that the Sixth Amendment right to counsel invalidated a Trial Court order

forbidding a Defendant and his attorney to communicate during an overnight trial recess that interrupted the Defendant's appearance on the witness stand. Both Perry and Gedders affirm that where there has been an actual or constructive denial of defense counsel's services, no showing of prejudice is required. The procedure required by the Trial Court in this matter deprived defense counsel of an opportunity to conduct a meaningful consultation regarding trial tactics and strategy with his client at a crucial point in the trial. Had the Court followed a logical and reasonable schedule, which would have permitted counsel an opportunity to confer at length with his client during Thursday evening, with knowledge of what instructions would be given and how closing arguments would appear, no Sixth Amendment violation would have been involved. However, because the Court did require analysis of

jury instructions in preparation of a closing of a three week trial within a fifteen minute period, the Court effectively deprived defense counsel of the opportunity to consult with his client during Thursday evening concerning the numerous tactical and strategic issues that naturally would have been discussed at that point of the proceedings. Depravations of such an opportunity to consult during an overnight recess is very similar to the right to counsel violation found in Gedders. Even though the Defendant's testimony was not interrupted, as it was in Gedders, the gist of the violation is the same: Deprivation of an opportunity to consult during a crucial period of the trial.

The procedures followed by the Trial Court and approved by the Circuit Court of Appeal are clear abuses of discretion which deprived Petitioner of his right to a fair

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to United States Attorney, Middle District of Florida, 500 Zack Street, Suite 400, Tampa, Florida 33602, A. Hechtkopf, Chief Criminal Appeals and Tax Enforcement Policy Section, Tax Division, Department of Justice, Post Office Box 502, Washington, D.C. 20044, and the Solicitor General, Department of Justice, Washington, D.C., 20530 this 21ST day of October, 1989.

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Attorney for Petitioner

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1989 Term

GUILLERMO SUAREZ, Petitioner,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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Counsel for Petitioner

APPENDIX

1. Order of Eleventh Circuit Court of Appeals, August 24, 1989

2. Judgment of United States District Court, Middle District Florida, U.S. vs. Suarez, October 17, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

- - - - - - - - - - - - - - -

No. 88-2861

- - - - - - - - - - - - - - -

D. C. Docket No. 88-104

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUILLERMO SUAREZ,

Defendant-Appellant

- -

Appeal from the United States District Court for the Middle District of Florida

- -

(August 24, 1989)

Before FAY and HATCHETT, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

GUILLERMO SUAREZ

8432 Meadow Brook Drive

Largo, Florida 34647

SSN: 263-06-6303

Judgment in a Criminal Case

Case No: 88-104-Cr-T-15(B)

Anthony J. LaSpada

Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

____ guilty ____ nolo contendere or

____ not guilty as to count(s) one, two and three of the indictment.

THERE WAS A:

____ finding ____ verdict of guilty as to counts two and three of the indictment

THERE WAS A:

____ finding ____ verdict of not guilty as to count(s) ____ judgment of acquittal as to

this judgment, and as a Special; Condition of probation the defendant shall, 1. Pay a fine to the United States in the amount of $50,000.00 (FIFTY THOUSAND DOLLARS) within 6 (SIX) MONTHS, and 2. Contribute 500 (FIVE HUNDRED) HOURS of community service per year during the term of probation. Sentence imposed in Count Three to run consecutively to sentence imposed in Count Two.

Execution of the sentence imposed herein is deferred until January 3, 1989 when defendant is notified by the U.S. Marshal as to when, where and to whom he should surrender for execution of such sentence pursuant to the Voluntary Surrender Program.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probations set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with you probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the

probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $___ pursuant to Title 18, U.S.C. Section 3013 for counts(s) _____ as follows:

(offense committed prior to November 1984)

IT IS FURTHER ORDERED THAT counts _____ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

____ The Court orders commitment to the custody of the Attorney General and recommends:

October 7, 1988

Date of Imposition of Sentence

/s/

Signature of Judicial Officer

WILLIAM J. CASTAGNA, U.S. DISTRICT JUDGE

Name and Title of Judicial Officer

October 17, 1988

Date

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

Date

at _____,

the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____

UNITED STATES MARSHAL

By _____

Deputy Marshal

No. 89-846

In the Supreme Court of the United States

OCTOBER TERM, 1989

GUILLERMO SUAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated Fed. R. Crim. P. 30 when, after hearing closing arguments, it supplemented a proposed jury instruction that it had provided to the parties during the charge conference.

2. Whether the district court abused its discretion when it denied petitioner's counsel's request for additional time to prepare for closing argument.

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GUILLERMO SUAREZ, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1989. The petition for a writ of certiorari was filed on October 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Middle District of Florida, petitioner was convicted on two counts of willfully at-

tempting to evade taxes, in violation of 26 U.S.C. 7201. He was sentenced to six months' imprisonment, five years' probation, a $50,000 fine, and community service. Pet. App. 2-3. The court of appeals affirmed the conviction without opinion.

1. During 1982 and 1983, petitioner was a physician with a family practice in St. Petersburg, Florida.[1] He operated as a professional corporation. On the joint returns that he filed with his wife for those years, petitioner failed to report as income: (i) a number of $2500 monthly bonuses that he received from the corporation; (ii) cash that he diverted from office receipts; and (iii) payments from corporate funds for personal expenses. On his income tax returns, petitioner reported adjusted gross income of $39,222 for 1982 and $60,000 for 1983. As calculated by the government, petitioner's gross income was actually $89,361.45 for 1982 and $92,420.05 for 1983. Petitioner's tax deficiencies amounted to $11,746.26 for 1982 and $8,205.91 for 1983. Gov't C.A. Br. 3-8.

The theory of the defense was that there had been no tax deficiency and that any shortfall in petitioner's reported income was not willful. Petitioner did not testify. With respect to the monthly bonuses, one of petitioner's accountants testified that he considered the payments to be repayments of loans that the corporation had received from petitioner. However, the accountant conceded that he had never seen the interest rate on the purported loans and had no information regarding their maturity date. The loans were not reflected on petitioner's financial statements. Office employees testified that the accountant and petitioner had referred to the payments as bonuses,

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[1] The indictment charged petitioner with attempting to evade taxes for the 1981, 1982, and 1983 tax years. Petitioner was acquitted with respect to 1981. See Pet. App. 1.

and the payments were recorded as "bonus" in check registers. Finally, in connection with a mortgage loan, petitioner advised a bank representative that he received a bonus of $2500 per month, and another of petitioner's accountants confirmed the existence of the bonuses in a letter to the bank. That accountant testified that petitioner had never told him that the payments were loan repayments. Gov't C.A. Br. 4-5.

3. Petitioner's case was completed during the afternoon of July 21, 1988, a Thursday. The government announced that it would present no rebuttal. After a brief colloquy, the court decided to allow each party an hour and a half for closing argument. Petitioner's counsel then asked the court to postpone the arguments until Saturday morning. The trial court denied that request, explaining that it wished to complete arguments that day so that the jury could deliberate on Friday and perhaps avoid a Saturday session. 13 Tr. 123-124.

After a brief recess, the court began the charge conference. The court gave counsel for both parties its proposed jury instructions and began to go through them one by one, inviting counsel to raise questions and make comments or objections concerning individual instructions. 13 Tr. 125-141. Petitioner's counsel objected to that procedure, saying that he had not had an opportunity to review the court's proposed instructions or compare them to his requested instructions. *Id.* at 125, 130. The district court responded by allowing petitioner's counsel time to consider each instruction. For instance, in answer to petitioner's counsel's complaint that he had not been able to compare one proposed instruction to an instruction requested by the defense, the court stated, "Well, read it, compare it and tell me if you have any objection to it." *Id.* at 132. See *id.* at 137-138 (granting counsel's response for a "chance to read [an instruction] a little more thoroughly").

Before all of the proposed instructions had been reviewed, the court announced that it was going to bring in the jury for closing arguments. Petitioner's counsel did not object to going forward with closing arguments before the charge conference was completed and did not argue that Fed. R. Crim. P. 30 prohibited that procedure. 13 Tr. 141. Consequently, counsel delivered their closing arguments on Thursday afternoon (*id.* at 141-226), and the court completed the charge conference the following morning (14 Tr. 2-40).

During the portion of the charge conference that preceded closing arguments, the government asked the court to supplement an instruction (requested by the defense) that the court had included in its proposed instructions. In the form in which the court provided it to the parties at the beginning of the charge conference, the instruction provided that amounts received as loans or repayments of loans are not taxable income; the prosecutor argued that the instruction should also make clear that simply calling a transaction a loan does not make it a loan unless the borrower has a good faith intent to repay funds that have been advanced. 13 Tr. 138-139. The court denied the government's request, but told the prosecutor that "if you want to argue that simply designating a loan a loan does not make it a loan unless it really is a loan, you're at liberty to argue that." *Id.* at 139. After closing arguments, the government renewed its request for language making it clear that there must be an intent to repay a loan. 14 Tr. 10-16. While petitioner's counsel argued against the addition of that language, he did not maintain that Fed. R. Crim. P. 30 foreclosed amending the instruction or that his closing argument had been affected by the omission of the supplemental language from the court's proposed instruction. 14 Tr. 10-16. The district court amended the loan instruction in the manner suggested by

the government, observing that the amendment was "accurate," "sensible," "in conformity with the issues presented to the jury," and not prejudicial to petitioner. 14 Tr. 14.

ARGUMENT

1. Petitioner contends that the district court violated Fed. R. Crim. P. 30 by interrupting the charge conference to hear closing arguments and later amending the jury instruction on the tax treatment of loans. Pet. 10-16.

When the district court interrupted the charge conference, petitioner's counsel did not suggest that Rule 30 prohibited that course. Similarly, although counsel objected to the substance of the amendment proposed by the prosecutor to the loan instruction, he did not contend that Rule 30 prohibited the court from adopting it. Consequently, petitioner's claim that the district court violated Rule 30 is foreclosed in the absence of plain error. Fed. R. Crim. P. 52(b). This Court has repeatedly emphasized that "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985), quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). No such showing can be made on the record of this case.

The procedure followed by the court in this case was in compliance with Rule 30.[2] By its terms, that rule requires

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[2] Rule 30 provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * The court shall inform counsel of its proposed ac-

the trial court to "inform counsel of its *proposed* action upon the [parties' written] requests [for instructions] prior to their arguments to the jury" (emphasis added). In this case, the district court provided counsel with copies of its proposed instructions—which reflected the court's action on both parties' requests—before closing arguments. Although courts often hear objections to their proposed instructions and consider modifications during a charge conference conducted before oral arguments begin, Rule 30 does not mandate that procedure.[3] There was no error, let alone plain error, in the procedure that the district court followed here.

Similarly, Rule 30 did not prohibit the court from adding the sentence proposed by the government to the loan instruction after closing arguments had been completed.[4]

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tion upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

[3] Cf. *United States* v. *Williams*, 447 F.2d 894, 901 (5th Cir. 1971) (in a case in which the district court stated that it found nothing in the parties' requested instructions that it would "state flatly" that it would not charge, but that it would instruct the jury in its own language, there was no prejudicial violation of Rule 30).

[4] Petitioner was the party that requested the loan instruction. See 14 Tr. 10. The government requested only that the instruction be modified through the insertion of a sentence clarifying its application to sham loans. 13 Tr. 139; 14 Tr. 10-16. The instruction was discussed before closing arguments. 13 Tr. 139. Thus, petitioner was aware before closing arguments that the court had granted his request for a loan instruction. The only point that remained in question, and which was subsequently resolved in favor of the government, was whether the instruction would include the clarifying language requested by the prosecutor.

The purpose of the rule is "to fairly inform the trial lawyers [of the instructions] so that they may intelligently argue to the jury." *United States* v. *Fusaro,* 708 F.2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983).[5] In keeping with this purpose, the courts have recognized that Rule 30 permits a trial court to modify or supplement a proposed instruction after closing arguments in order to prevent the jury from becoming confused and deciding the case on the basis of a mistaken understanding of the law. *United States* v. *Bowman,* 798 F.2d 333 (8th Cir. 1986); *United States* v. *Buishas,* 791 F.2d 1310, 1316-1317 (7th Cir. 1986); *United States* v. *Smith,* 789 F.2d 196, 202-203 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); *United States* v. *Newson,* 531 F.2d 979, 982-983 (10th Cir. 1976); *United States* v. *Shirley,* 435 F.2d 1076, 1078 (7th Cir. 1970).[6] *Bowman* and *Smith,* the cases on which petitioner principally relies (Pet. 11), are among the cases that have applied Rule 30 in this manner.[7]

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[5] Accord *United States* v. *Bowman,* 798 F.2d 333 (8th Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *Wright* v. *United States,* 339 F.2d 578, 580 (9th Cir. 1964); *United States* v. *Shirley,* 435 F.2d 1076, 1078 (7th Cir. 1970).

[6] The courts have also agreed that the rule does not guarantee advance knowledge of all instructions, but requires only that the trial court inform counsel of its rulings on instructions requested by the parties. *United States* v. *Buishas,* 791 F.2d at 1316; *United States* v. *Newson,* 531 F.2d at 982-983; *United States* v. *Clarke,* 468 F.2d 890, 892 (5th Cir. 1972).

[7] In *Smith,* the Third Circuit upheld a supplemental jury instruction delivered a day after the court had charged the jury, noting that the supplemental instruction "did not state a new theory" and that defense counsel was on notice of the issue the instruction addressed. 789 F.2d at 203. In *Bowman,* the trial court modified a defendant's requested instruction on credibility but delivered the "gist" of the instruction; the Eighth Circuit held that the trial court's action "complied with both the letter and the purpose of Rule 30." 798 F.2d at 336. In *United*

Under the standards applied in these cases, the district court acted within its discretion when it clarified its proposed loan instruction after closing arguments. The post-argument addition to that instruction only made clear that sham loans—*i.e.*, transactions in which a borrower has no good-faith intent to repay funds that it has received—are includable in a taxpayer's gross income.[8] As the district

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States v. *Cardall*, 550 F.2d 604, 607 (10th Cir. 1976), cert. denied, 434 U.S. 841 (1977), the only other case addressing Rule 30 that is cited in the petition, the trial court apparently overlooked ruling on certain requested instructions; the Tenth Circuit held that in the absence of any objection or any indication of resulting prejudice, the violation of Rule 30 did not constitute grounds for reversal of the conviction. The reasoning of *Smith*, *Bowman*, and *Cardall* are entirely consistent with the decision of the court of appeals in this case.

This case bears no resemblance to cases in which convictions have been reversed on the basis of violations of Rule 30. See *Wright* v. *United States*, 339 F.2d 578, 579-580 (9th Cir. 1964) (court refused to give defense counsel any indication of whether instructions requested by the defense would be given; as a result, "counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent instructions"); *United States* v. *Mendoza*, 473 F.2d 697, 700-701 & n.2 (5th Cir. 1973) (trial court refused to provide specific rulings on instructions requested by the defense before closing arguments and then denied many of those requests after arguments had been heard).

[8] The court instructed the jury as follows (14 Tr. 51) (emphasis added to material added after closing arguments at the request of the government):

> Now, a loan, which the parties to the loan agree is to be repaid, does not constitute gross income as that term is defined by the Internal Revenue Code. If you find that a distribution received by the defendant or any part thereof was either a loan from the corporation which was to be repaid or the repayment of a loan which had been made by defendant to the corporation, then to the extent that the distribution was a loan or a repayment thereof, it would not be income and taxable to the defendant. A loan which the parties to the loan agree is to be repaid does not constitute

court noted, that clarification was undoubtedly a correct statement of the law, and it served to assure that the jury would not misunderstand or misapply the remainder of the instruction. *United States* v. *Pomponio*, 563 F.2d 659, 662-663 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States* v. *Swallow*, 511 F.2d 514, 519, 522-523 & n.7 (10th Cir.), cert. denied, 423 U.S. 845 (1975); *United States* v. *Rosenthal*, 470 F.2d 837, 841-842 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973); *United States* v. *Rochelle*, 384 F.2d 748, 751-752 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968). Significantly, the new language did not change the substance of the proposed instruction that the court had made available to the parties. In its initial form, the instruction stated twice that a loan "which the parties to the loan agree is to be repaid" is not includable in gross income; the sentence added after closing arguments only made it explicit that a good faith intent to repay is an element of such an agreement. A modification of this kind, which leaves the substance of an instruction unchanged, does not violate Rule 30. See *United States* v. *Shirley*, 435 F.2d at 1078 (approving post-argument modification to requested instruction that "simply removed a potential source of confusion concerning the elements of the crime charged which might have marred the jury's deliberation").

The court's clarification of the loan instruction also did not deprive petitioner's counsel of any opportunity to argue petitioner's loan defense. Before beginning his argument, petitioner's counsel was aware that the jury would

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gross income as that term is defined by the Internal Revenue Code. *However, merely denominating a transaction as a loan is not sufficient to make it such, and where there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.*

be instructed that loans are not includable in gross income. He was thus free to call the jury's attention to any evidence that might support an acquittal on that basis and to alert the jury to that forthcoming instruction. Since sham loans are indisputably taxable, counsel could not have argued for an acquittal on a theory inconsistent with the subsequent clarification in any event. Thus, this is not a case in which counsel could have been misled into arguing a theory of the defense that the court subsequently foreclosed in its jury instructions. Compare *Wright* v. *United States,* 339 F.2d 578, 580 (9th Cir. 1964). The clarification of the loan instruction simply did not curtail or undercut any permissible jury argument that was available to petitioner.

There is no merit to petitioner's claim that his attorney would have "addressed more thoroughly the intent-to-repay aspect of the facts" had he known of the forthcoming modification. Pet. 12. Petitioner has not identified any evidence on that question that he could have, but did not, call to the jury's attention. There was none. There were no contemporaneous documents or other evidences of indebtedness that bore on whether petitioner had advanced funds to the corporation with the expectation that they would be repaid. The fact that the parties' closing arguments focused on whether the loans existed at all and whether petitioner had treated the bonuses as loan repayments during the period he was receiving them was a consequence of the evidence in the case, not the court's handling of proposed instructions. Finally, although it declined initially to add the language requested by the government, the court advised both parties that the prosecutor would be permitted "to argue that simply designating a loan a loan does not make it a loan unless it really is a loan." 14 Tr. 139. As petitioner's counsel well knew, he

was also free to devote as much attention to that issue as he wished.

In short, there was no violation of Rule 30 in this case, much less a violation resulting in "a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 15. Furthermore, even if there had been a violation and petitioner had timely raised the issue, petitioner could not establish that he suffered any actual prejudice—a necessary predicate for relief based on a violation of Rule 30. *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974).

2. Petitioner also contends (Pet. 16-21) that the district court's refusal to postpone closing arguments was an abuse of discretion.

A trial judge has broad discretion with respect to requests for continuances and recesses in the course of trial proceedings. *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983); *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *Carter* v. *United States*, 373 F.2d 911, 914 (9th Cir. 1967); *Johnson* v. *United States*, 291 F.2d 150, 153 (8th Cir.), cert. denied, 368 U.S. 880 (1961). The exercise of this discretion will be disturbed on appeal only in the event of "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.' " *Morris* v. *Slappy*, 461 U.S. at 11-12, quoting *Ungar* v. *Sarafite*, 376 U.S. at 589.

The facts of this case do not disclose an abuse of the court's discretion to schedule its proceedings. The only asserted basis for the request for a recess was petitioner's counsel's claim that he had not "had a chance to really go through" the evidence he had introduced through defense witnesses that day and the day before. 13 Tr. 124. However, the district court was entitled to discount the suggestion that an experienced attorney was unfamiliar with evidence he himself had presented only a short time before. Moreover, having observed petitioner's counsel

throughout the trial, the court noted that he was "sufficiently familiar with the details of this case to be able to do as good a job today as you would do tomorrow or Saturday." *Ibid.* In fact, counsel's closing argument did include a detailed recitation of evidence presented by numerous witnesses. 13 Tr. 175-212. Significantly, petitioner's court of appeals brief and the petition have identified no shortcoming in counsel's closing argument that could be attributed to the court's refusal to grant the request for a recess. This record provides no support for a conclusion that the trial court abused its discretion or that petitioner was prejudiced by the district court's decision.[9]

The denial of a recess did not interfere with petitioner's Sixth Amendment right to the assistance of counsel. See Pet. 19-21. Petitioner was not prohibited from conferring with his counsel concerning his closing argument or any other matter at any point during the trial. Moreover, when

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[9] Contrary to petitioner's contention (Pet. 18-19), there is no conflict between the decision in this case and *United States* v. *McLain*, 823 F.2d 1457, 1460 (11th Cir. 1987). In *McLain*, in an effort to speed up the trial, the judge informed the attorneys that they were being clocked by the courtroom deputy, and the judge periodically announced how much court time had elapsed and how much time each attorney had used. *Ibid.* When the court became dissatisfied with the pace of the trial, she carried out a threat to begin court sessions at 7:30 each morning. *Ibid.* As a result of this "excruciating trial schedule," jurors became restless and inattentive. In an effort to ensure their attentiveness, the judge allowed jurors to eat and drink while seated in the jury box, and to stand while attorneys were conducting their examinations. *Id.* at 1460-1461. These measures proved ineffective: there were reports of jurors sleeping throughout the trial. *Id.* at 1461. The schedule also exhausted counsel, who often worked until midnight preparing for the next day. *Ibid.* There is no parallel between those unusual facts and the facts of this case. In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

he sought a recess, petitioner's counsel did not suggest that he needed time to consult with petitioner. Thus, this case does not implicate any of the concerns underlying this Court's decisions in *Perry* v. *Leeke*, 109 S. Ct. 594 (1989), and *Geders* v. *United States*, 425 U.S. 80 (1976).[10] Neither *Geders* nor *Perry* suggests that a defendant has a constitutional right to require a trial court to recess a trial at a time of the defendant's choosing to enable him to speak with his attorney. See *United States* v. *Vasquez*, 732 F.2d 846, 847-848 (11th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] In *Geders*, this Court held that an order preventing the defendant from consulting with his attorney during a 17-hour overnight recess between the defendant's direct and cross-examination violated the defendant's Sixth Amendment right to the assistance of counsel. In *Perry*, the Court held that a defendant need not show prejudice to obtain a reversal of a conviction where he is impermissibly barred from consulting with his counsel during a break in trial proceedings, as in *Geders*.

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